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No. 07-1102

FILED

JUN 16 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CHARLES AND LESA CANAS, as Natural Guardians and Next Friends of DEREK CANAS, and DEREK CANAS, Individually,

Petitioners,

v.

AYMAN AL-JABI, M.D.; SHARON J. KAMINER, M.D.; BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA d/b/a MEDICAL COLLEGE OF GEORGIA HOSPITALS AND CLINICS; and MCG HEALTH, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR REHEARING

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PETITION FOR REHEARING

The petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia in *Kaminer v. Canas,* 653 S.E.2d 691 (Ga. 2007) was denied on May 27, 2007. This petition for rehearing is timely brought pursuant to Rule 44(2) because in the aftermath of the *Kaminer* decision, two new cases construing the same medical malpractice statute of limitations have progressed to the Supreme Court of Georgia – more in a steady twenty-year progression of these same medical limitation cases to Georgia's appellate courts – still unable to fashion an interpretation of their "new injury" common law exception which conforms with due process. The seemingly plain statute provides that a "cause of action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred." O.C.G.A. § 9-3-71(a). Based on *Kaminer* and the two subsequent cases, the statute as now interpreted reads as follows:

> a cause of action for medical malpractice must be brought within two years after the date of death or first injury, i.e. misdiagnosis, arising from a negligent or wrongful act or omission occurred; except that when a patient later suffers a new injury from the first misdiagnosis, the patient may then bring a cause of action for the new injury within two years of the later injury, provided that the patient has been asymptomatic with respect to the first injury in the intervening interval.

This evolved common law distortion of the plain English of the statute renders it void for vagueness under due process pronouncements by this Court. Generic childhood illness symptoms provided Canas with no notice he had AIDS or had been misdiagnosed, but barred his claim.

The first of the two irreconcilable post *Kaminer* cases, *Amu v. Barnes,* 2008 WL 2228669 (Ga.) was decided by the Supreme Court of Georgia on June 2, 2008. The juxtaposition of that case, with *Kaminer* makes plain how the interpretation of the judicially engrafted "new injury" exception to the statute produces arbitrary, inconsistent results.

In *Amu,* the patient Barnes saw the defendant Dr. Amu on one occasion on January 12, 2000 with rectal bleeding. At the time of the visit with Amu a section of Barnes' colon had polyps indicative of early malignancy. In the spring of 2004, more than two years after the first "injury" [which triggered the Georgia medical malpractice statute of limitations in *Kaminer*], Barnes had episodes of abdominal cramping and a recurrence of rectal bleeding. A colonoscopy at that time demonstrated a large tumor in the colon with the cancer having spread to the lymph nodes and liver. The Supreme Court of Georgia applied "the new injury" common law created exception to the medical malpractice statute of limitations. It did not bar the Barnes claim against Amu even though filed more than two years after the initial injury because the cancer present in 2000 did not metastasize until

2004. Barnes apparently was asymptomatic for almost four years.

In a separate and concurring opinion in *Amu,* Chief Justice Sears noted that "*Kaminer* is the stronger case for application of the new injury rule." The majority, however, distinguished *Kaminer* because after the initial malpractice in *Kaminer,* Canas "did not develop any new condition and experienced only symptoms otherwise attributable [by whom?] to the worsening of his AIDS condition." Yet the record in *Kaminer* included a visit where she found Canas asymptomatic and a subsequent period of almost four years between visits.

Canas, when first misdiagnosed by Drs. Kaminer and Al-Jabi in the early 1990s, had prior bouts of bronchitis, fever and tooth decay, all of which preceded the fatal initial visits, and then recurred. Kaminer did not personally observe many of the symptoms, but recorded them as history. These recurring symptoms then by implication provided the "notice" [critical to constitutional due process] to the patient of the possibility of a misdiagnosis of AIDS [the injury], notwithstanding the fact that Canas was less than ten years old. Canas, unlike Barnes, continued to be cared for and treated by the same doctors, who despite their training, also disclaimed "notice" of any connection between his generic symptoms and AIDS. Thus, the symptoms were sufficient to trigger a limitations statute against a minor patient, but insufficient to provide trained physicians with notice of their misdiagnosis.

Due process requires that *plaintiff* have some form of notice of invasion of legal rights. *See, Urie v. Thompson,* 337 U.S. 163, 170 (1999). "Symptoms" are the due process "notice" lynchpin in Georgia. Yet, because recurring generic childhood illnesses put a child on notice of an injury, AIDS, while rectal bleeding did **not** put an adult on notice of the possibility of colon cancer, the same law produced arbitrary and irreconcilable results.

The Supreme Court of Georgia has not yet resolved *Cleaveland v. Gannon*, 655 S.E.2.d 662 (Ga. App. 2007) (*cert.* granted January 28, 2008 and case argued same day as *Amu* with decision pending) the second case involving the same law. Paradoxically *Kaminer* is relied upon by both the majority and the dissent in the lower appellate court which continues to disagree on how the "new injury" exception found nowhere in O.C.G.A. § 9-3-71(a) applies. In *Cleaveland* the appellate court preserved the claim of another cancer patient brought more than two years after initial [injury] misdiagnosis. The dissenting opinion complained that the majority had again engrafted a "discovery" exception onto the statute when the statute says only that the cause of action is triggered by "an injury," and argued that Gannon's metastasized cancer was not a "new injury." Instead it was a rule of convenience employed by the majority to circumvent the statute.

Gannon had a CT scan in June of 2000 showing two masses on his left kidney. Urinalysis also showed

microscopic hematuria. Gannon was referred to Dr. Cleaveland, a urologist, for consultation regarding the hematuria in June of 2000. Cleaveland told Gannon that he had a small cyst on his kidney and referred him back to his primary care physician. In August of 2002, more than two years after the only visit to Dr. Cleaveland, Gannon noted a small amount of blood in his urine. Thereafter he found a lump in his neck, which, when investigated, demonstrated that he was suffering from kidney cancer that had metastasized. The masses detected on Gannon's kidney in June of 2000 were cancerous, the same cancer progressed and later metastasized. Gannon sued Dr. Cleaveland within two years of the date that the lump in his neck was found and the proper diagnosis was made, but more than two years after the original misdiagnosis. The Court of Appeals applied the "new injury exception" to the statute of limitations holding that "when a misdiagnosis results in subsequent injury that is difficult or impossible to date precisely, the statute of limitation runs from the date symptoms attributable to the new injury are manifest to the plaintiff." *Id.* at 665. This is simply a discovery rule applied to one kind of latent injury case, but not another.

In both *Cleaveland* and *Amu,* the doctor "first" misdiagnosed a patient's cancer condition more than two years prior to the filing of a lawsuit. In each case, because the patient was "asymptomatic" while the same cancer progressed to a metastasized form more than two years later, the patient then discovered a

"new injury" and sued within two years of that discovery. Thus, whether a cause of action is barred, depends upon the ability of uninformed patients to apply their marginal knowledge of medicine to connect later symptoms of a passing generic illness to an unknown earlier misdiagnosis. Canas had not gone through puberty when last seen by the defendant doctors at age sixteen, but that was not a "new injury." Kidney cancer is a new injury when a growing kidney cyst, more than two years later produced a lump on the neck.

Horn v. Burns and Roe, 536 F.2d 251, 254 (8th Cir. 1976) tracks this Court's requirements to void a statute for vagueness:

> The Supreme Court has recognized that a noncriminal statute is unconstitutionally vague under the due process clause of the Fifth or Fourteenth Amendments when its language does not convey sufficiently definite warning as to the proscribed conduct when measured by common understanding or practice. A noncriminal statute is not unconstitutionally vague, however, where its terms are such that the ordinary person exercising common sense can sufficiently understand and fulfill its prescriptions. A finding of vagueness will thus result only where "the exaction of obedience to a rule or standard * * * was so vague and indefinite as really to be no rule or standard at all * * * ", or where the statute is written in such terms that

> "men of common intelligence must necessarily guess at its meaning and differ as to its application * * * ".

[Internal citations to cases primarily decided by this Court omitted.]

The language of O.C.G.A. § 9-3-71(a) says only that a cause of an action must be brought within two years of an injury. The interpretative reading of the statute, as shown on the first page of this petition, does not conform to the test. Georgia jurists, charged with protecting a property right of this minor patient under the rule of law, instead arbitrarily sidestepped their own engrafted "new injury" exception to the statute, plainly added because patients routinely do not know when they have been injured [misdiagnosed] by medical malpractice. The tortured "new injury" exception to the statute, as espoused in *Kaminer* and its progeny, creates arbitrary classes of patients. Patients asymptomatic for more than two years can bring their cases if the original injury can be characterized conveniently as a new one. Patients with any symptom associated with the original misdiagnosis [injury] during the next two years have their claims barred whether the next injury is new or not. This is not the way the statute reads, and it is not the way people with common sense and ordinary intelligence could be expected to read it. The statute, as interpreted, does not pass the vagueness test employed by this Court. Canas brought his claim within two years of seeing and being misdiagnosed by the two doctors, against whom suit was filed; Barnes

and Gannon sued well over two years after each was misdiagnosed. Their claims survived, while the Canas claims failed.

If this judicially re-designed statute gets a pass here, then "notice," the fundamental cornerstone of due process, can be jettisoned from any civil state law limiting individual rights. This limitation law in effect required a child to play doctor to preserve his claim because fever or bronchitis sufficed as notice of a medical injury/misdiagnosis, to wit: AIDS, and started a statutory clock running. As absurdly re-written and applied by Georgia appellate courts, it denied Canas equal protection and due process. This Court should grant the petition for rehearing and hear the case.

Respectfully submitted,

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GOOD FAITH CERTIFICATION OF COUNSEL

Pursuant to Rule 44(2), I hereby certify that this Petition for Rehearing is brought in good faith and not interposed for the purpose of delay.

This 13th day of June, 2008.

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